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11 LENSRAFTERS, INC. and EYEXAM OF CALIFORNIA, INC.

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 OAKLAND DIVISION

15 LENSRAFTERS, INC.; and EYEXAM OF  
16 CALIFORNIA, INC.,

17 Plaintiffs,

18 v.

19 LIBERTY MUTUAL FIRE INSURANCE  
20 COMPANY; EXECUTIVE RISK SPECIALTY  
21 INSURANCE COMPANY; UNITED STATES  
22 FIRE INSURANCE COMPANY; MARKEL  
23 AMERICAN INSURANCE COMPANY; and  
24 WESTCHESTER FIRE INSURANCE  
25 COMPANY,

26 Defendants,

27 AND RELATED COUNTER- AND CROSS-  
28 CLAIMS.

Case No.: C-07-2853 SBA

**PLAINTIFFS AND COUNTER-  
DEFENDANTS LENSRAFTERS,  
INC. AND EYEXAM OF  
CALIFORNIA, INC.'S ANSWER TO  
WESTCHESTER FIRE  
INSURANCE COMPANY'S  
COUNTERCLAIM; DEMAND FOR  
JURY TRIAL**

Plaintiffs and Counter-Defendants LensCrafters, Inc. and EYEXAM of California, Inc. (together, "LensCrafters"), by and through their counsel, answer Defendant and Cross-Complainant Westchester Fire Insurance Company's ("Westchester") Counterclaim (the

1 “Counterclaim”) in this action, as follows:

2 1. In answer to paragraph 1 of the Counterclaim, LensCrafters responds that the  
3 allegations of the Counterclaim and cross-claim speak for themselves.

4 2. In answer to paragraph 2 of the Counterclaim, LensCrafters admits that there  
5 is a present active controversy between LensCrafters, Inc. and EYEXAM of California,  
6 Inc., on the one hand, and defendant insurers, on the other hand, concerning insurance  
7 coverage for the *Snow* Action and that a declaration of rights and obligations by this Court  
8 is appropriate at this time.

9 3. LensCrafters lacks information and knowledge sufficient either to admit or  
10 deny the allegations contained in paragraph 3 of the Counterclaim.

11 4. LensCrafters admits the allegations contained in paragraph 4 of the  
12 Counterclaim.

13 5. In answer to paragraph 5 of the Counterclaim, LensCrafters admits that  
14 EYEXAM of California, Inc. is a California corporation, but denies that its principal place  
15 of business is in Ohio.

16 6. LensCrafters lacks information and knowledge sufficient either to admit or  
17 deny the allegations contained in paragraph 6 of the Counterclaim.

18 7. LensCrafters lacks information and knowledge sufficient either to admit or  
19 deny the allegations contained in paragraph 7 of the Counterclaim.

20 8. LensCrafters lacks information and knowledge sufficient either to admit or  
21 deny the allegations contained in paragraph 8 of the Counterclaim.

22 9. LensCrafters lacks information and knowledge sufficient either to admit or  
23 deny the allegations contained in paragraph 9 of the Counterclaim.

24 10. LensCrafters admits the allegations contained in paragraph 10 of the  
25 Counterclaim.

26 11. LensCrafters admits the allegations contained in paragraph 11 of the  
27 Counterclaim.

28 12. In answer to paragraph 12 of the Counterclaim, LensCrafters responds that the

1 allegations in the complaint in the *Snow* Action speak for themselves.

2 13. LensCrafters admits the allegations contained in paragraph 13 of the  
3 Counterclaim.

4 14. In answer to paragraph 14 of the Counterclaim, LensCrafters admits that  
5 LensCrafters, Inc. and EYEXAM of California, Inc. are named as insureds under  
6 commercial general liability policies issued by Liberty Mutual Fire Insurance Company (the  
7 “Liberty Policies”) for eight consecutive annual policy periods from February 1, 1998  
8 through February 1, 2006; LensCrafters further admits that each of the Liberty Policies has  
9 limits for personal injury coverage of \$3 million for each occurrence and \$6 million in the  
10 aggregate. Except as specifically admitted, LensCrafters denies the allegations contained in  
11 paragraph 14.

12 15. In answer to paragraph 15 of the Counterclaim, LensCrafters admits that  
13 LensCrafters, Inc. and EYEXAM of California, Inc. are named as insureds under a  
14 Managed Care Errors and Omissions Liability policy issued by Executive Risk Specialty  
15 Insurance Company (the “ERSIC Policy”) for the period November 12, 2001 to November  
16 12, 2002; LensCrafters further admits that the ERSIC Policy has limits of liability of \$3  
17 million for each Claim (as defined in the ERSIC Policy) or Related Claim (as defined in the  
18 ERSIC Policy) and \$3 million in the aggregate. Except as specifically admitted,  
19 LensCrafters denies the allegations contained in paragraph 15.

20 16. In answer to paragraph 16 of the Counterclaim, LensCrafters admits that  
21 LensCrafters, Inc. and EYEXAM of California, Inc. are named as insureds under three  
22 commercial umbrella policies issued by United States Fire Insurance Company (the “U.S.  
23 Fire Policies”) for three consecutive annual policy periods from February 1, 1998 to  
24 February 1, 2001; LensCrafters further admits that each of the U.S. Fire Policies has limits  
25 of liability for personal injury coverage of \$25 million in excess of the retained limit for  
26 each occurrence and in the aggregate. Except as specifically admitted, LensCrafters denies  
27 the allegations contained in paragraph 16.

28 17. In answer to paragraph 17 of the Counterclaim, LensCrafters admits that

1 LensCrafters, Inc. and EYEXAM of California, Inc. are named as insureds under a  
2 commercial umbrella policy issued by Markel American Insurance Company (the “Markel  
3 Policy”) for the policy period February 1, 2001 to February 2, 2002; LensCrafters further  
4 admits that the Markel Policy has limits of liability for personal injury coverage of \$15  
5 million per occurrence and in the aggregate in excess of the limits of the underlying  
6 insurance. Except as specifically admitted, LensCrafters denies the allegations contained in  
7 paragraph 17.

8 18. In answer to paragraph 18 of the Counterclaim, LensCrafters admits that  
9 LensCrafters, Inc. and EYEXAM of California, Inc. are named as insureds under the excess  
10 policy issued by Westchester identified in that paragraph for the policy period from  
11 February 1, 2001 to February 1, 2002 and that this Westchester policy is excess to the  
12 Markel Policy and follows form, in part, to that policy; LensCrafters further admits that this  
13 Westchester policy has limits for personal injury coverage of \$10 million per occurrence  
14 and in the aggregate in excess of the Markel Policy. Except as specifically admitted,  
15 LensCrafters denies the allegations contained in paragraph 18.

16 19. In answer to paragraph 19 of the Counterclaim, LensCrafters admits that  
17 LensCrafters, Inc. and EYEXAM of California, Inc. are named as insureds under the  
18 commercial umbrella policies listed in paragraph 19, that Westchester issued these policies,  
19 that the policies were issued for the policy periods identified in paragraph 19, and that the  
20 policies each had liability limits for personal injury coverage of \$25 million in excess of the  
21 retained limit per occurrence and in the aggregate. Except as specifically admitted,  
22 LensCrafters denies the allegations contained in paragraph 19.

23 20. In answer to paragraph 20 of the Counterclaim, LensCrafters incorporates its  
24 answers to paragraphs 1 through 19 inclusive.

25 21. In answer to paragraph 21 of the Counterclaim, LensCrafters admits that there  
26 exists an actual controversy between Westchester, on the one hand, and LensCrafters, Inc.  
27 and EYEXAM of California, Inc., on the other hand, concerning their respective rights and  
28 duties under the Westchester Excess Policy (as defined in the Counterclaim) and the

1 Westchester Umbrella Policies (as defined in the Counterclaim) with regard to  
2 Westchester's indemnity obligations. LensCrafters lacks sufficient information either to  
3 admit or deny the remaining allegations in paragraph 21.

4 22. Paragraph 22 of the Counterclaim, including subparts (a) through (f), contains  
5 legal conclusions, rather than facts that LensCrafters can either admit or deny. To the  
6 extent that LensCrafters is required to admit or deny the allegations contained in paragraph  
7 22, LensCrafters denies all such allegations.

8 23. In answer to paragraph 23 of the Counterclaim, LensCrafters admits that a  
9 declaration of rights by this Court is appropriate at this time. Except as specifically  
10 admitted, LensCrafters denies the allegations contained in paragraph 23.

11 24. In answer to paragraph 24 of the Counterclaim, LensCrafters incorporates its  
12 answers to paragraphs 1 through 19 inclusive.

13 25. LensCrafters denies the allegations contained in paragraph 25 of the  
14 Counterclaim.

15 26. LensCrafters denies the allegations contained in paragraph 26 of the  
16 Counterclaim.

### 17 **AFFIRMATIVE DEFENSES**

18 By way of Affirmative Defenses, LensCrafters alleges as follows:

#### 19 First Affirmative Defense

20 The Counterclaim fails to state facts sufficient to constitute a claim against  
21 LensCrafters upon which relief can be granted.

#### 22 Second Affirmative Defense

23 The Counterclaim is barred in whole or in part by the doctrine of laches.

#### 24 Third Affirmative Defense

25 The Counterclaim is barred in whole or in part by the doctrine of unclean hands.

#### 26 Fourth Affirmative Defense

27 The Counterclaim is barred in whole or in part by the doctrine of waiver.  
28

1 Fifth Affirmative Defense

2 The Counterclaim is barred in whole or in part by the doctrine of estoppel.

3 Sixth Affirmative Defense

4 The Counterclaim is barred by whole or in part by the applicable statute of  
5 limitations.

6 Seventh Affirmative Defense

7 Westchester is barred in whole or in part from any recovery because it has breached  
8 the terms and conditions of the Westchester Excess Policy and/or the Westchester Umbrella  
9 Policies including, but not limited to, the failure to settle the *Snow* Action and the failure to  
10 indemnify LensCrafters in the *Snow* Action.

11 Eighth Affirmative Defense

12 Westchester is barred in whole or in part from recovery because it has engaged in  
13 improper, retaliatory and bad faith conduct against LensCrafters including, but not limited  
14 to, unreasonable failure to comply with the terms of the Westchester Excess Policy and/or  
15 the Westchester Umbrella Policies, denying coverage for the *Snow* Action without any  
16 reasonable basis to do so, failing to undertake a reasonable and thorough investigation of  
17 the claims against LensCrafters in the *Snow* Action, failing to fund a reasonable settlement  
18 of the *Snow* Action, and placing its own interests above the interests of its insured.

19 Ninth Affirmative Defense

20 The Counterclaim does not state a claim that is ripe for adjudication to the extent that  
21 it seeks to add claims in addition to those at issue in Plaintiffs Complaint for Declaratory  
22 Relief or any amendments thereto.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, LensCrafters requests this Court to enter judgment as follows:

- 25 1. For a declaration that Westchester has a duty to indemnify LensCrafters with  
26 respect to any judgment or settlement in the *Snow* Action;  
27 2. For an award to LensCrafters of its attorneys' fees and costs of suit; and  
28 3. For such other and further relief as the Court may deem just and appropriate.

1 DATED: August 20, 2007

HELLER EHRMAN LLP

2  
3  
4 By /s/ Celia M. Jackson

5 Celia M. Jackson

6 Attorneys for Plaintiffs and Counter-Defendants  
LENSCRAFTERS, INC. and EYEXAM OF  
CALIFORNIA, INC.

7  
8 **DEMAND FOR JURY TRIAL**

9 Plaintiff and Counter-Defendants LensCrafters, Inc. and EYEXAM of California,  
10 Inc. hereby demand trial by jury.

11 DATED: August 20, 2007

HELLER EHRMAN LLP

12  
13 By /s/ Celia M. Jackson

14 Celia M. Jackson

15 Attorneys for Plaintiffs and Counter-Defendants  
LENSCRAFTERS, INC. and EYEXAM OF  
16 CALIFORNIA, INC.